

CRIMINAL APPEAL No.207 OF 1988

Against the judgment and order dated 23rd March 1988, passed in Sessions Trial No.128 of 1987, by Shri Budhdeo Narain Sinha, 8th Additional Sessions Judge, Bhojpur, Arrah.

1. Tuntun Rai
2. Dharichan Rai
3. Ram Bachan Rai
4. Rama Kant Rai
5. Ashok Rai Appellants

versus

The State of Bihar Respondent

For the Appellants : Mr. Ashwini Kumar Sinha
For the State : Mr. Lala Kailash Bihari
 Prasad, A.P.P

P R E S E N T

THE HON'BLE MR. JUSTICE SUDHIR KUMAR KATRIAR

THE HON'BLE MR. JUSTICE SAMRENDRA PRATAP SINGH

**S K Katriar &
S P Singh, J.J.**

This appeal at the instance of the five appellants is directed against the judgment dated 23rd March 1988, passed by the learned 8th Additional Sessions Judge, Bhojpur, Arrah, in Sessions Trial No.128 of 1987 (State of Bihar through Ramji Dubey, informant vs. Khublal Rai & Others), whereby they have been convicted under Section 395 of the Indian Penal Code, and have been sentenced to undergo rigorous imprisonment for life. Seven persons had been put on trial out of whom Khublal Rai alias Julum Rai and Sri Ram Dubey were charged under Section 395 of the Indian Penal Code, the former had been further charged under Section 204 and have been acquitted of the charges. The remaining five accused persons who are the appellants herein, have been convicted under section 395 IPC, and sentenced to undergo

imprisonment for life. Therefore, the five appellants are before us.

2. According to the Fardbeyan (Ext.5), of one Ranji Dubey (PW 3), recorded at the place of occurrence in his house on 8.12.85, at about 7 p.m., he and his wife Shanti Devi (PW 7) were in their room because of his indisposition. His brother, uncle, and other family members were present in the house. His daughter Neelam and sister (Umrawati PW 9) were feeding the family members. He suddenly heard the sound of gun-shot just outside the entry door of his house and found that four persons had stormed into his house, amongst whom he identified Ram Bachan Rai (appellant no.3), and Rama Kant Rai (appellant no.4), who were saying that the gun is in the room and they should break open the door. Thereafter they broke open the door and 3/4 persons entered the room. In the light of the earthen lamp (diya), he identified appellant nos. 3 and 4 who were armed with country made pistol. Appellant no.3 put off the earthen lamp and took possession of the gun which was kept in the cavity of the wall. The informant caught hold of the gun upon which appellant no.4 pointed his pistol at his chest and ordered the informant to leave the gun otherwise he would be shot dead. The informant let off the gun. While making their exit from the room, the dacoits had taken away a black colour leather suitcase containing 13000/- in cash, two dhotis, one white colour kurta of terrycotton material, as well the clothes and jewellery of his wife and

sister, along with a box of alumuinum. While making their escape, appellant nos. 3 and 4 shouted the slogan "Bolo Bajrangwali ki jai", which other accused persons repeated five times. They had made their exit through the potato field in front of the house. The informant also identified Ashok Kumar Rai (appellant no.5) who was also armed with a country-made pistol. 14/15 persons had entered the house. They also injured his uncle, Ram Narain Dubey (PW 2), and his first cousin, Umrawati Devi (PW 9), with their fire arms. Later on his uncle told him that he had identified appellant no.1 and appellant no.5. The two injured persons were treated in the Arrah Hospital. Tuntun Rai and his family members committed dacoity because of village politics. The fardbeyan was so recorded at the place of occurrence, namely, in the dalan of the house, on 8.12.85, at about 11 p.m.

3. On these allegations, a formal First Information Report (FIR) was drawn on 9.12.85 at 7 A.M., and was registered as Barhara PS Case No.0187/85. Column no.3 of the same records that it was forwarded to the court on 9.12.85 which has been marked Ext.7. It may be stated for the sake of completion of record that the said Ram Narain Dubey had also made his fardbeyan in the hospital on 11.11.85, while undergoing treatment. There is no need to go into the details of the same because the police had already commenced investigation on the basis of Ext.5. After conclusion of investigation, the police submitted charge-sheet against the aforesaid seven accused persons under

Section 395, IPC. Charge was framed against Khublal Rai @ Julum Rai under section 412, IPC also.

4. The case was committed to the court of Sessions and was registered as Sessions Trial No.128/87. The prosecution examined 11 witnesses in support of its case including the informant (PW 3), his wife (PW 7), the Medical Officer (PW 8), and the Investigating Officer (PW 10). They proved as many as 30 documents marked Ext.1 to Ext.10. The defence examined two witnesses who have proved four documents marked Ext.A to Ext.D.

5. PW 1 (Lakshman Dubey) has proved a large number of documents marked Ext.1 series. He has deposed about the mode and manner of the occurrence and has supported the prosecution case. The houses of the prosecution party and the accused persons are separate by one house belonging to Madan Upadhyay. He has deposed to the effect that there used to be litigation with his family and that of the accused. He has supported the prosecution case in so far as the mode and manner of the occurrence is concerned, but has not stated at all on the question of identification of the accused persons.

PW 2 is Ram Narayan Dubey. He has deposed to the effect that he was along with his daughter Umarawati (PW 9) were sitting in the dalan of the house where his daughter was feeding him. He had seen the dacoits storming into the house, entering into his nephew's room and decamping with the booty. While making their exit, they had fired

from their fire arms at him and PW 9 which injured them as a result of which they had to be taken to the Arrah Hospital for treatment, where his fardbeyan was also recorded. He claims to have identified appellant nos. 1, 2 and 5. His evidence with respect to both aspects of the matter- the mode and manner of the occurrence as well as identification of the appellants - is without any contradiction. PW 2 was subjected to protracted cross-examination but the defence has not been able to elicit any contradiction in his deposition.

PW 3 (Ram jee Dubey) is the informant. At the of occurrence, while all the family members were in the dalan and were taking their dinner, he was in his room along with his wife (PW 7) because of his indisposition. He has given a vivid description of the mode and manner of the occurrence and has supported the prosecution case. He had identified appellant nos. 3 and 4 while he was in his room at the time of dacoity in the light of the earthen lamp. After the dacoits had decamped with the booty and trampled their way through the potato field, the informant had mounted on the roof of the house and identified the appellants. He is the informant and has fully supported the prosecution case, the mode and manner of the occurrence as stated in the fardbeyan, and has also identified three appellants. He has also given description with reasonable details about the materials loss to him and the family. He was subjected to an

exceptionally long cross-examination but he has remained consistent all along.

PW 4 (Deo Nath Dubey) has proved the mode and manner of the occurrence without any material contradiction. He has, however, not identified any accused person.

PW 5 (Daya Shankar Singh) is a formal witness but has denied to have been present at the time of recovery of articles. He said he was not at all concerned with it. His deposition is of no consequence at all.

PW 6 (Daya Shankar Yadav) is a formal witness and is a witness to the seizure list.

PW 7 (Shanti Devi) is the wife of the informant (PW 3), and was present in the room because of indisposition of her husband. She has supported the prosecution case as to the mode and manner of the occurrence and has identified appellant nos. 3 and 4. The defence has not been able to elicit any material contradiction in her statement.

PW 8 (Akhauri Kailash Bihari) was the medical officer posted at Arrah Sadar Hospital and had examined PWs. 2 and 9. As the occurrence had not been denied by the accused persons before us, there is no need to discuss the evidence of PW 8 any further. Furthermore, the charge is under section 395 of the Indian Penal Code.

PW 9 (Umarawati Devi) is the first cousin of the informant (PW 3), and was in the dalan along with her father (PW 2). She was feeding her father. While she has given reasonable details of

the mode and manner of the occurrence, she has not identified any one of the accused persons. The defence has not been able to elicit any material contradiction in her deposition.

PW 10 (Vrindaban Bihari Sharma) was the officer-in-charge of the Barhari police station who had recorded the fardbeyan (Ext.5), conducted the investigation and had submitted the charge-sheet. He recorded the fardbeyan on 8.12.85 at 11 p.m. and conducted local inspection of the house and the potato field. He had seized 20 bullets from the room of PW 3. He was subjected to a lengthy cross-examination which has not adversely affected the prosecution case.

PW 11 (Dashrath Pandey) is a formal witness and has identified the handwriting and signature of Punit Lal Shah, the Sub Inspector of Police.

6. The defence has examined two witnesses. DW 1 (Satyadeo Narayan) is Advocate's Clerk who is a formal witness and has proved certain signatures. DW 2 (Umesh Singh) is also an Advocate's Clerk, who is a formal witness and has also proved certain signatures.

7. The statements of the accused persons were recorded in terms of Section 313 of the Code of Criminal Procedure who pleaded not guilty and claimed to be tried. They were subjected to trial leading to the impugned judgment. Hence this appeal at the instance of the five appellants.

8. Learned counsel for the appellants has submitted that the mode and manner of the

occurrence stands proved. He has, however, challenged the complicity of the appellants in the commission of the offence. He has tried to make out a case that they have been falsely implicated because of the long-standing enmity between the two sides who are agnates, neighbours to the extent that they are separated by one house. The prosecution witnesses have not supported the prosecution case in so far as identification of the accused persons are concerned. In his submission, in so far as appellant nos. 1, 2, 3 and 4 are concerned, it is a case of single identification. In the facts and circumstances of the case, single identification of four appellants is inadequate which, if upheld by the Court, then the charge under section 395 has to be dropped in so far as appellant no.5 (Ashok Rai) is concerned. Learned counsel submits that no independent witness has been examined in so far as identification of the accused persons are concerned. He relied on the judgment of a Division Bench of this Court reported in 1985 Bihar Law Judgments 44 (Magaram Rajak vs. State of Bihar). He further submits that appellant no.5 was 16 years of age as on 8.12.85, the date of occurrence, and was a juvenile within the meaning of the Juvenile Justice (Care & Protection of Children) Act 2000. He lastly submits that the sentence is excessive and is normally not awarded in cases under Section 395 IPC.

9. Learned Public Prosecutor has, on the other hand, submitted that the fardbeyan was

recorded and the FIR was forwarded to the court without any delay at all. He next submits that the judgment in the case of Magaram Rajak is not applicable to the facts and circumstances of the present case because the police had recorded the statement of PW 7. He also submits that identification of appellant nos. 1 and 2 are cases of single identification though they are trustworthy witnesses and is in the facts and circumstances of the case adequate. He next submits that appellant nos.3 and 4 were identified by two witnesses each. He submits in the same vein that in view of the position that both the sides are co-villagers and neighbours, identification was not difficult. They were also identified by their voice. He also submits that in view of the contention of the appellants admitting the mode and manner of the occurrence as well as the admitted enmity between the parties, the question of identification of the accused persons is in no doubt. He lastly submits that appellant no.5 formed part of the group of the accused persons who were a determined lot, and were armed with a pistol. He was surely liable for commission of the offence. In view of the position that he was in custody as under-trial prisoner from 16.12.85 to 2.5.88, his case may be remitted to the Board for consideration for the purpose of sentence.

10. We have perused the materials on record and considered the submissions of learned counsel for the parties. The mode and manner of the occurrence as stated in the fardbeyan has been

consistently proved by PWs. 1, 2, 3, 4, 5, 6, 7 and 9. They have consistently deposed that the five appellants had stormed into the house of the informant along with his wife were in their bedroom because of his indisposition. The accused persons had entered the dalan of the informant with a bang after firing a gun-shot in the air. The sound had frightened his wife (PW 7) who had immediately put on the latches of the door. After they had entered the dalan, they said that the gun was in the room occupied by the informant and gave a call to break the door open which they did. PW 3 and PW 7 noticed that the five accused persons entered the room and took hold of the gun which was lodged in the cavity created in the wall for the purpose. PW 3 (the informant) had caught hold of the gun when he noticed that the same was being carried away upon which appellant no.4 (Rama Kant Rai) had pointed a pistol towards him and threatened to kill him if he did not let off the gun. Frightened by the threat, he let off the gun. The accused persons retreated with the gun and other articles lying in the room. While making their escape, they had fired at PW 9 (Umarawati Devi) as well as to her father PW 2 (Ram Narayan Dubey). PW 3 and PW 7 have deposed that they had identified appellant nos. 3 and 4 in the light of the diya which was burning there. The other inmates of the house who were present in the dalan, who are PWs. 1, 2, 4 and 9, supported the prosecution case without any contradiction. PW 2 and PW 3 were subjected to detailed cross-

examination but the defence has not been able to elicit any contradiction. We are, therefore, convinced that the prosecution has been able to prove the mode and manner of the occurrence. The five appellants had stormed into the house of the informant and had escaped with the belongings of the inmates. Indeed learned counsel for the appellants has not challenged the factum of the occurrence.

11. This takes us on to the question of identification of the accused persons. It appears to us that PW 2 who is uncle of the informant was sitting in the dalan along with other inmates and was taking his dinner being served by PW 7. He has consistently deposed that he identified appellant nos. 1 and 2. In view of the position that both the sides are co-villagers and well known to each other, it was not difficult to identify them. Furthermore, PW 3 has deposed to the effect that the accused persons had not covered their faces. There is nothing in the evidence of PW 2 to shake his credibility. Furthermore, PW 2 was aged 60 years on the date of deposition and, therefore, a mature person to capture the events. He must be seeing the accused persons in the village who are also agnates.

PW 3 (the informant), was in his bedroom at the time of the occurrence, and had identified appellant nos. 3 and 4. Both are co-villagers, and it was not difficult to identify them because of the light being emitted by the earthen lamp in a situation where the accused persons had not

covered their faces. They are also co-villagers as well as agnates and must be seeing other in the village. The fact that PWs. 3 and 7 identified only two of the accused persons amongst others present there, is also a pointer to the reliability of his deposition. Otherwise nothing prevented them from deposing to the effect that they had recognized all the accused persons.

PW 2 and PW 3 also identified appellant no.5 for the reasons indicated above. We find their depositions identifying PW 5 to be trustworthy. We, therefore, find and hold that appellant nos. 1 and 2 were identified by one witness each, appellant nos. 3, 4, and 5 were identified by three witnesses each.

12. In view of the foregoing discussion, we are of the view that the five appellants are guilty of commission of the offence under section 395 of the Indian Penal Code.

13. This takes us on to the question of sentence. Learned counsel for the appellants has submitted that the sentence of life imprisonment in the facts and circumstances of the case is harsh and excessive. We shall first of all take up the case of appellant nos. 1 to 4. They appear to be dare-devils, being co-villagers and agnates, had stormed into the house of the informant, with a bang broke open the door and entered into the bedroom of the informant. PWs. 3 and 7 were in the room which was broken open completely violating the privacy of the couple. They created a reign of terror in the house and carried away the

belongings of the poor family including their double-barrel gun. When the informant (PW 3) had resisted the gun being taken away, he was threatened at pistol point. We are further horrified to find that while retreating with the booty, and without the slightest provocation and most needlessly, they fired at PW 2 and PW 9 who were taking their dinner, creating a reign of terror with the most innocent persons. They also carried away the licensed fire-arm of PW 3 meant for his own safety. The reign of terror created by the accused persons did not give the informant any scope to protect himself. We are convinced that in view of the foregoing discussion, the sentence of rigorous imprisonment for life is the appropriate sentence in so far as these four appellants are concerned.

We shall now consider the case of appellant no.5 on the question of sentence. According to the learned counsel for the appellants, appellant no.5 was aged 18 years when his statement under section 313 Cr.P.C. was recorded on 3.11.1987. The cause title of the judgment giving the description of the accused person is 18 years on 23.3.1988. Learned counsel, therefore, submits that he was aged 16 years on the date of the occurrence. We would like to state that mention of age as 18 years in the statement under section 313 CrPC was on the basis of the unilateral version of appellant no.5, and was not recorded on the basis of his evidence. Mention of age as 18 years in the cause title of judgment was

mere a rough estimate of age made by learned Sessions Judge. As such no concrete finding can be given with full certainty regarding his exact age on the date of commission of offence which occurred on 8.12.1985. However, we agree with the submission of learned counsel for the appellants that appellant no.5 has a case in view of the aforesaid recording of age that he was below 18 years on the date of occurrence.

In this view of the matter, the appellant no.5 is entitled to due consideration under the Juvenile Justice (Care and Protection of Children) Act 2000 and the Rules framed thereunder. We, therefore, set aside that portion of judgment whereby the sentence of life imprisonment has been inflicted on appellant no.5 and remit his case for the purpose under Section 15 of the Act to the Board for determination of sentence.

14. In the result, we convict the five appellants under section 395 of the Indian Penal Code. Appellant nos. 1 to 4 shall undergo rigorous imprisonment for life. Their bail bonds are hereby cancelled and they shall surrender before the learned trial court to serve the remaining portions of their sentence. In so far as appellant no.5 is concerned, the sentence of life imprisonment is hereby set aside, and his case is

remitted to the Board to determine and pass appropriate sentence under Section 15 of the Rules.

(S K Katriar)

(S P Singh)

The Patna High Court
The 11th of July 2008
NAFR/ mrl.

